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Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT of the UNITED STATES

October Term, 1991

SAMUEL I. PRATHER,

Petitioner,

vs.

THE DAYTON POWER AND LIGHT COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
For the Sixth Circuit

EDWARD S. MONOHAN
(Counsel of Record)
KENNETH W. SCOTT
7711 Tanners Lane
P.O. Box 157
Florence, KY 41022-0157
(606) 283-1140
Attorneys for Petitioner,
Samuel I. Prather

I.

QUESTIONS PRESENTED FOR REVIEW

DOES PATTERSON V. McCLEAN CREDIT UNION APPLY TO ALL DISCRIMINATORY DISCHARGE CASES?

SHOULD PATTERSON v. McCLEAN CREDIT UNION HAVE BEEN APPLIED RETROACTIVELY WHERE SUMMARY JUDGMENT HAD ALREADY BEEN GRANTED IN PETITIONER'S FAVOR ON THE ISSUE OF LIABILITY AND WHERE THE ONLY ISSUES LEFT TO BE RESOLVED WERE THE TYPES AND AMOUNTS OF DAMAGES DUE HIM?

WHERE THE FACTS ALLEGED IN PETITIONER'S TENDERED SECOND AMENDED COMPLAINT AROSE FROM THE SAME CONDUCT AND OCCURRENCES ALLEGED IN PETITIONER'S ORIGINAL AND FIRST AMENDED COMPLAINTS, AND WHERE THE OPPOSING PARTY IS AWARE OF THESE FACTS AND WOULD NOT BE UNDULY PREJUDICED BY THE PROPOSED AMENDMENTS, SHOULD PRATHER HAVE BEEN PERMITTED TO AMEND HIS COMPLAINT TO CONFORM TO THE NEW STANDARDS SUBSEQUENTLY SET FORTH IN PATTERSON v. McCLEAN CREDIT UNION?

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The citation to the most recent decision of the United States Court of Appeals for the Sixth Circuit is Prather v. Dayton Power & Light Co., 918 F.2d 1255 (1990), set forth in the Appendix at p. A1. The decisions of the United States District Court for the Southern District of Ohio are unreported and are set forth in the Appendix at pp. A16 and A31, respectively..

JURISDICTIONAL STATEMENT

Petitioner, Samuel I. Prather, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Sixth Circuit entered on November 14, 1990, which affirmed the decision of the United

States District Court for the Southern District of Ohio. Petitioner's Motion for Rehearing was denied by the United States Court of Appeals for the Sixth Circuit on December 28, 1990.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

42 U.S.C. Section 1981. See Appendix at p. A43.

STATEMENT OF THE CASE

On March 18, 1985, Prather filed his original Complaint in the United States District Court for the Southern District of Ohio pursuant to the provisions of 42 U.S.C. 1981, seeking injunctive relief (reinstatement) and compensatory and exemplary damages against DP&L. Based on a previous state court judgment and the doctrine of res judicata, Prather moved for summary judgment in the District Court on the issue of DP&L's liability under Section 1981.

Following an intermediate appeal to the Sixth Circuit on a statute of limitations issue, the case was remanded to the District Court. Upon remand the magistrate recommended that Prather's Summary Judgment Motion as to DP&L's liability be granted, based on the

doctrine of res judicata. Thereafter, both parties consented to Magistrate trial jurisdiction under 28 U.S.C. 636(c), and on March 17, 1989, the Magistrate adopted his prior Report and Recommendations as a decision, with certain modifications. Immediately prior to that Order, Prather filed an Amended Complaint specifying his damages claims and the parties prepared a proposed joint final pretrial order which was journalized with slight modifications after a final pretrial conference held on August 4, 1989.

At the final pretrial conference, (four days before trial) DP&L sought leave to file a Motion for Summary Judgment. Leave was granted and DP&L filed the motion, sub judice, on August 9, 1989, based on this Court's decision in Patterson v. McClean Credit Union,

491 U.S. ____, 105 L.Ed. 2d 132, 109 S.Ct. 2363 (decided June 15, 1989). Prather filed his Memorandum in Opposition on August 10th. On the morning of trial, August 14, 1989, the Magistrate granted DP&L's Motion for Summary Judgment, thereby dismissing Prather's amended complaint (without prejudice) for failure to state a claim upon which relief can be granted; and dismissing with prejudice, Prather's claim for racially motivated discharge.

In its Journal Entry dated August 14, 1989, the Magistrate permitted Prather to file a written Motion for Leave to Amend its Complaint to conform to the new standards set forth in Patterson. Prather filed the motion and tendered his Second Amended Complaint therewith. Simultaneously, Prather filed a Motion to Alter, Amend or Vacate

the Decision and Entry of the Magistrate granting DP&L's Motion for Summary Judgment. The Magistrate denied Prather's Motion to Amend the Judgment on September 7, 1989.

On September 25, 1989, Prather filed a Supplement to his Motion to Amend his Complaint; this Supplement contained specific references to DP&L's retaliatory conduct during the arbitration and grievance procedures. With time running, and no decision having been made on its Motion to Amend his Complaint, Prather filed for a 30 day extension of time (to 11/6/89) to file his Notice of Appeal from the Magistrate's Decision and Entry of August 14, 1989; said extension was duly granted.

In its Decision and Order dated October 30, 1989, the Magistrate denied Prather's Motion to Amend his Complaint.

Prather appealed the Magistrate's Decision and Entry granting DP&L's Motion for Summary Judgment and denying his Motion to Amend his Complaint to the United States Court of Appeals for the Sixth Circuit. It is from the Sixth Circuit's affirmation of the District Court's Judgment that this Petition for Certiorari arises.

STATEMENT OF THE FACTS

Petitioner, Samuel I. Prather, a black male, started working for the Dayton Power and Light Company on March 19, 1970, at the Stuart Generating Station. Through a series of promotions, Prather attained the highest

status in his rank, First Class Technician A. During his 12 1/2 years of service with the Company, Prather's only discipline was a one day suspension.

Prather worked with a crew of seven other technicians, all of whom were white; his immediate supervisor, Mike Mason, was white; and another white foreman, Bob Hackathorn, also had supervisory authority over Prather. The manager of Prather's unit, David Elkins, was white, as was the manager of the Stuart Station, Bob Ralston.

On Sunday, September 12, 1982, Prather was working with a helper and had three job assignments. When they reported to the shop to obtain materials for their second job, they heard general laughter, and were informed that some other employees had punched holes in a

water hose so that when two men, Danny Doyle and Bob Hackathorn, used the hose, they were sprayed with water. While this hose was being repaired, foremen Mason and Hackathorn left the area, and some of the employees resumed trying to punch more holes in another piece of hose. In the midst of this activity, someone passed Prather a knife and encouraged him to cut another hole in the hose, which he did.

This kind of "horseplay" was an everyday occurrence at the Stuart Station, and never resulted in punishment or discipline of any kind. For example, both supervisors and other employees routinely engaged in various acts, some physically harmful, including dumping buckets of water on each other, busting hard hats, and wrestling and grabbing other individuals' testicles.

Foremen Mike Mason and Bob Hackathorn were involved in many such incidents. Even Station Manager Ralston admitted discharging a handgun at the worksite, and later testified that he "couldn't recall" whether Company property was damaged in the process. Many of these acts of horseplay also damaged Company property, including incidents where employees would find their lockers glued or welded shut. One such employee, John Fuert, reported such an incident to management, but there was never any disciplinary action taken.

In each of the above mentioned cases the participants were white, and none of them were ever disciplined for those actions. In fact, although foremen Mason and Hackathorn themselves were aware of, and participated in many of these incidents, they had <u>never</u>

written up any employee for either horseplay or destruction of Company property.

On the day in question (September 12, 1982), however, Hackathorn thought he saw Prather cutting the hose and told Mason about it. The two white foreman wrote memoranda about the incident to Unit Manager Elkins, who in turn reported it to Station Manager Ralston. Ralston instructed Elkins to investigate the matter. Pursuant to this alleged "investigation", Elkins submitted a recommendation to Ralston that Prather be discharged, based on several "conclusions". Elkins stated that the "root cause" of Prather's actions was a "basic character flaw"; that Prather does not see the right or wrong of damaging Company property, be it in the act of horseplay or otherwise; and that

the only "effective corrective action" which would remedy Prather's "basic character flaw" would have to be termination, as any lesser discipline would not remedy that "non-trainable flaw". Based on this recommendation, Prather was placed on "indefinite suspension" on September 13, 1989. Shortly thereafter, (9/20/89), Prather was notified of his discharge by a letter signed only by Elkins.

The record establishes that Mason, Hackathorn, and Elkins are admitted racists and/or have exhibited racist behavior. For example, earlier in 1982, Mason told Prather that "if anybody ever got to walk your (Prather's) fat black ass to the gate, he (Mason) hoped he was the one to do it!", this statement was attested to by both Prather and witness, Eddie Grooms. Mason continually made

racial slurs and degrading remarks about Prather in the presence of witness Frank Rosselot. Rosselot testified that he had frequently heard Mason call Prather "a lazy black bastard" and a "nigger". Mason also made no secret of his racism to witness John Feurt, who returned from a work related back injury on September 14, 1982, while Prather was still on an indefinite suspension pending the alleged "investigation" of the matter. At that time, Mason informed Feurt that "we're finally rid of that lazy fuckin' nigger!"

With regard to the other employee who "reported" Prather's actions; Bob Hackathorn admitted that he was "prejudiced", but "working on it."

Throughout the course of his employment, Prather was a member of the recognized labor bargaining unit known

as "Local 175, Utility Workers, AFL-CIO". Immediately following his being placed on "indefinite suspension", Prather called for the intervention of Union Steward, Jim Work, who represented Prather throughout the labor contract arbitration procedure. Work indicated that he attempted to defend Prather during the contract grievance procedure, but that fear of retaliation by the Company (DP&L) kept potential witnesses silent.

Another DP&L employee, Randy Moore, indicated that fellow employees were afraid to come forward to help Prather because they feared retaliation by the Company, especially after seeing what happened to Danny Doyle when he tried to help Prather. Another employee, Danny Dudley, indicated that it was clear to him that the Company had no intention of

allowing a fair investigation or a free airing of the issues during the Company investigation of the incident. Dudley further indicated that all of the hourly employees felt indirect pressure concerning the Prather incident which made it impossible for them to assist Prather.

One DP&L employee who attempted to assist Prather during the arbitration procedure was subjected to more direct pressure. In his affidavit, Danny Doyle stated:

> Some time during the investigation by the Ohio Civil Rights Commission (OCRC) he agreed to give an affidavit concerning his personal involvement in horseplay and in the fact that he cut a hose only on a representation by the investigator for the OCRC that the affidavit would be kept in strictest confidence because he feared retaliation. Just prior to his testimony before the OCRC he was

> approached by a fellow employee who told him that Bob Ralston was very displeased by his cooperation with the OCRC and that he would keep his job if he would recant the affidavit and tell the OCRC that the affidavit was given under stress. That when he refused to recant the affidavit, he was left on indefinite suspension by DP&L. That he was later restored to his job at DP&L because of pressure from the OCRC.

Arbitration, a nonjudicial method of adjudicating disputes, was Prather's last avenue of relief prior to his termination. In summary, the arbitration panel concluded that the testimony adduced during the hearing did not show that racial bias entered into the cause for or the decision to discharge Prather.

BASIS FOR FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

The jurisdiction of the United States District Court for the Southern District of Ohio was invoked pursuant to the provisions of 28 U.S.C. 1343(a) and 42 U.S.C. 1981.

REASONS FOR GRANTING THE WRIT

Petitioner, Samuel I. Prather, submits that the Judgment entered in this case by the United States Court of Appeals for the Sixth Circuit is in conflict with the decision entered by the United States Court of Appeals for the Eighth Circuit on the issue of whether discriminatory discharges continue to be actionable under 42 U.S.C. Section 1981, in light of this Court's decision in Patterson v.

Mcclean Credit Union, and thus, there is a need for a uniform rule of law on this point.

I.

On August 14, 1989, the District Court dismissed Petitioner's (plaintiff/appellant below) cause of action for racially motivated discharge citing, Patterson v. Mcclean Credit Union, 491 U.S. ____, 105 L.Ed. 2d 132, 109 S.Ct. 2363 (1989). The Sixth Circuit Court of Appeals affirmed the ruling of the District Court citing Patterson for the proposition that all discriminatory discharge cases are no longer actionable under 42 U.S.C. 1981.

Petitioner submits that the Sixth Circuit's decision bars Petitioner's complete relief and leads to a tenuous view that the length of time between a

claimant's hiring and his discharge is the deciding factor in whether a discriminatory discharge action brought under Section 1981 can withstand Patterson.

In affirming the grant of Respondent's (appellee below) motion for summary judgment, the Sixth Circuit has taken upon itself to do what this Court itself has refused to do.

In Jett v. Dallas Independent School District, ____ U.S. ___, 109 S.Ct. 2702, 2709, 105 L.Ed. 2d 598 (1989), decided one week after Patterson, this Court left unresolved the issue of whether discriminatory discharges continue to be actionable under Section 1981. More recently, this Court again reaffirmed that Patterson did not resolve the issue of whether discriminatory discharges are actionable

under Section 1981. See, Lylte v. Household Manufacturing, Inc., ___ U.S. ___, 110 S.Ct. 1331, 108 L.Ed. 2d 504 (1990).

In his dissenting opinion, Judge Boggs of the Sixth Circuit wrote, "I believe that a logical and faithful reading of the Supreme Court law compels the conclusion that discriminatory discharges are actionable under 42 U.S.C. 1981." In support of his position Judge Boggs reasoned:

> The entire reason for protecting "the right to make contracts" is because of the benefits of the status of having a contract or job. If 1981 can cover the failure to achieve a "new and distinct relation" [promotion] within an existing job, it would seem to me to be most illogical to deny that 1981 covers a persons being cast into a "new and distinct relation" -- that of unemployment -- from an existing job. Certainly that severance is far more drastic

> in practical terms than the failure to achieve a promotion. It is also more destructive of the existing relationship, the very relationship that is a reason given for not allowing actions based on conditions of employment.

Prather v. Dayton Power & Light Company, 918 F. 2d 1255, 1261, (6th Cir. 1990) (Boggs, J., dissenting).

Judge Boggs' views are in line with the opinion handed down by the United States Court of Appeals for the Eighth Circuit in Hicks v. Brown Group, Inc., 902 F. 2d 630 (8th Cir. 1990). In Hicks, the Eighth Circuit held, "Based on our examination of the nature of discharge and our interpretation of Section 1981, as well as the legislative history of Section 1981, we conclude that a claim for discriminatory discharge continues to be cognizable under Section 1981."

Circuit Judge McMillian, writing for the majority of the Eighth Circuit explained the court's position as follows:

> Because protection from racially motivated deprivations of contracts is essential to the full enjoyment of the right to make contracts, we hold that discriminatory discharge continues to be actionable under Section 1981. Discharge is fundamentally different from racial harassment or discrimination in the terms or conditions of employment. A employee who is harassed or subject to discriminatory terms or conditions of employment still receives the fundamental benefit of his or her employment contract - the employment itself - even though that employment may be unpleasant, degrading or obnoxious. In distinction, discriminatory discharge goes to the very existence and nature of the employment contract. A discriminatory discharge completely deprives the employee of his or her employment, the very essence of the right to make employment contracts...

> Accordingly we hold that discriminatory discharge directly affects the right to make contracts, and therefore is cognizable under Section 1981.

Hicks v. Brown Group, Inc., 902 F. 2d 630, 638-9 (8th Cir. 1990).

In a thorough analysis of the legislative history behind the Civil Rights Act of 1866, and particularly Section 1981, the Eighth Circuit further supported its decision by concluding that, "The legislative history of the Civil Rights Act of 1866 (1866 Act) supports [the] conclusion that Section 1981 prohibits discharges based on race." Hicks v. Brown Group, Inc., 902 F. 2d 630, 642 (8th Cir. 1990).

By concluding, that Patterson "logically extends to racially motivated discharges", the District Court and the Sixth Circuit have extended the scope of

Patterson beyond that enunciated by the Court.

Petitioner requests this Court to adhere to the doctrine of stare decisis and reaffirm the landmark case of Runyon v.McCrary, 427 U.S. 160 (1976), wherein it was firmly established that discriminatory discharge cases are actionable under 42 U.S.C. Section 1981.

II.

Petitioner further argues that Patterson should not have been applied retroactively where summary judgment had already been granted in his favor on the issue of liability and where the only issues left to be decided were the types and amount of damages due him.

First, Petitioner acknowledges that, "as a general rule, judicial decisions apply retroactively." Robinson

v. Neil, 409 U.S. 505, 507, 93 S.Ct. 876, 35 L.Ed.2d 29 (1973). However, this Court has recognized exceptions to the general rule. In Chevron Oil Co. v. Huson, 404 U.S. 97, 30 L.Ed. 2d 296, 306, 92 S.Ct. 349 (1971), this Court set forth three factors which should be considered before a case arising from the Supreme Court is applied retroactively. In that case this court stated:

> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactivley must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied,(citation omitted) or by deciding an issue of first impression whose resolution was not clearly foreshadowed (citation omitted). Second, it has been stressed that we must weigh the merits and demerits in each case by

> looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation (citation omitted). Finally, we have weighed the inequity imposed by retroactive application, for where a decision of this court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice of hardship by a holding of nonretroactivity (citation omitted).

Id. at 30 L.Ed. 2d 296, 306.

Addressing the first factor discussed above, Petitioner argues that Patterson undeniably overrules clear past precedent. From the time that this action was initiated through its Motion for Summary Judgment on the issue of Respondent's liability, Petitioner correctly relied on existing law to support its position that, "the elements of a claim for relief from racial

discrimination under 42 U.S.C. 1981 are identical to those under Title VII, 42 U.S.C. 2000e et seq." See, Prather v. Dayton Power & Light Co., No.C-3-85-491 (S.D. OH 1988) Because of Patterson, this proposition is no longer a correct statement of the law.

The second factor is whether a retroactive application of the new rule (here, Patterson), will "further or retard its operation." Nonretroactive application of Patterson to the case at bar would not retard the purpose underlying Patterson (ie..to limit the application of section 1981 to the making and enforcement of contractual relations). This is because Petitioner's discharge claim is inextricably intertwined with his "right to enforce established contract obligations" (through grievance

procedures, including arbitration; both, nonjudicial methods of adjudicating disputes), thus falling within the enumerated rights set forth in Section 1981, and, consistent with the decision reached in Patterson. Furthermore, other parties bringing Section 1981 claims accruing after Patterson will be able to plead and litigate their claims according to the Patterson limitations, unlike the Petitioner herein, whose cause of action and subsequent judgment in his favor, existed prior to the Patterson decision.

The inequities of this latter consideration evolves into the third factor considered by the Chevron Court, that is, the substantial inequitable results that may be brought to bear upon a plaintiff whose cause of action accrued prior to a change in the law.

Retroactive application of Patterson to the instant case effectively deprives Petitioner of any chance of recovery under Section 1981 in an action where the Respondent's "appalling" conduct and liability for racial discrimination had already been firmly established.

Second, case law supports the contention that Patterson should not be applied retroactively. See, Gillespie v. First Interstate Bank, 50 FEP Cases 587, 588, n.2 (D.C. E. Wis., decided July 14, 1989). In that case, Bridget Gillespie brought an action against her employer, First Interstate Bank of Wisconsin, alleging racial discrimination in employment and retaliatory discharge in violation of 42 U.S.C. Section 1981. Gillespie filed her action on September 6, 1985. Plaintiff, the Equal Employment Opportunity Commission

(EEOC), filed an action on September 25, 1985, against First Interstate alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq. The two cases were consolidated on January 8, 1986. In denying the defendant's motion to dismiss pursuant to the subsequent decision of the Supreme Court in Patterson, the court stated:

> In light of the standards governing retroactivity, (citation omitted) I conclude that Patterson should not be applied retroactively.
>
> It is clear that racial discrimination in the context of discharge or other conditions of employment was recognized as actionable under section 1981 by the Seventh Circuit prior to Patterson. (citations omitted). In addition, nonretroactive application will not hamper the interests in establishing uniformity and reducing litigation as this case is today resolved for all practical purposes in this

> court. Finally, this case was already tried and awaiting a decision on post verdict motions when Patterson was decided. The parties have expended substantial time and money in prosecuting or defending this suit. I find that retroactive application of Patterson would be entirely unfair and inequitable under the circumstances.

Id. at 50 FEP Cases 588, n.2 (emphasis added).

As in Gillespie, Petitioner herein argues that racial discrimination in the context of discharge or other conditions of employment was recognized as actionable under Section 1981 prior to the Patterson decision.

In the instant case, like the case before the Gillespie court, the issue of Respondent's liability under Section 1981 has been resolved for all practical purposes since the District Court granted Petitioner's Motion for Summary

Judgment on the issue of Respondent's liability on April 18, 1988. Therefore, Patterson should not have been applied retroactively where as here, there remained only issues involving the types and amount of damages due Petitioner under section 1981.

III.

Rule 15(a), of the Federal Rules of Civil Procedure provides that leave to amend a pleading "shall be freely given when justice so requires" and this Court has stated that this mandate is to be heeded:

> If the underlying facts or circumstances relied upon by plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason-such as undue delay, bad faith or dilatory motive on the part of

> the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the allowance of the amendment, futility of amendment etc.-the leave sought should, as the rules require, be "freely given."
>
> Of course, the grant or denial of an opportunity to amend is within the discretion of the trial court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules. (emphasis added).

Foreman v. Davis, 371 U.S. 178, 9 L.Ed. 2d 222, 83 S.Ct. 227 (1962).

While the Foreman, decision set forth a variety of factors that the court may consider in determining whether to grant leave to amend, the crucial factor is the resulting prejudice to the opposing party. United States v. Hougham, 364 U.S. 310, 5 L.Ed.

2d 8, 81 S.Ct. 13 (1960), Hageman v. Signal L.P. Gas Co., 486 F.2d 479 (6th Cir. 1973).

While usually referred to simply as prejudice, the prejudice to the opposing party must be undue or substantial prejudice. See, Hageman v. Signal L.P. Gas Co., 486 F.2d 479 (6th Cir. 1973). The burden is upon the opposing party to assert and demonstrate that it will be substantially prejudiced by the proposed amendments. Hageman, supra, at 484.

Generally, an opposing party will not be prejudiced by an amended pleading if the amendment relates to the same conduct, transaction, or occurrence alleged in the original pleading, or if the opposing party is aware of the facts contained in the amended pleading. 27 Fed. Proc. L.Ed. 381, 397, citing, inter alia, Hageman, supra, (emphasis added).

In affirming the District Court's Decision denying Petitioner's Motion to Amend its Complaint, the Sixth Circuit concluded that, "To force appellee (DP&L) to begin to formulate a defense to these allegations at this late date would be highly prejudicial." In reaching its decision the Sixth Circuit construed the word "discharge" to have a limited, technical meaning.

Petitioner submits that a claim of discriminatory discharge covers the <u>whole process</u> from initial layoff through the grievance procedure to a final determination of employment status.

In the present case, the claims that were the subject of Petitioner's tendered Second Amended Complaint arose out of the same conduct and occurrences which formed the basis of Petitioner's

original and first amended complaint. In support of this position, Petitioner argues that the discharge process began when Petitioner was first accused of cutting the hose; the decision was then made to suspend Petitioner indefinitely pending further investigation. Petitioner immediately called for the intervention of Union Steward Jim Work, who represented Petitioner throughout the arbitration proceedings. The ultimate conclusion of the arbitration panel (which sustained the decision of the Company) was tainted by false testimony and intimidation of witnesses. All steps of the grievance procedure are inherent in the discharge process which was illegally tainted under the proscriptions of 42 U.S.C. Section 1981.

This Court has previously ruled that the factor of time alone is not

sufficient to constitute prejudice and prevent an amendment to a complaint. Johnson vs. Atlantic G. & W.I. Transit Co., 156 U.S. 619 (1895). Cleveland Newspaper Guild v. Plain Dealer, 839 F.2d 1147 (6th. Cir. 1988).

Other than the lapse of time itself, there is nothing in the record to show how the Respondent would have been prejudiced by the amendment. All of the witnesses are still in Respondent's employ and available for deposition at any time. The clear fact is that time has not eroded Respondent's ability to defend the case.

Additionally, Petitioner argues that while the facts regarding the Respondent's interference with Petitioner's established contract rights may not have been in issue during the course of this litigation, they are by

no means new facts unknown to Respondent.

At the time that Petitioner filed this action, the limitations imposed by Patterson did not exist. Petitioner should not be charged with the duty of foreseeing pending changes in the law and should certainly not be deprived of his cause of action where he has pleaded and litigated his case properly from its inception.

CONCLUSION

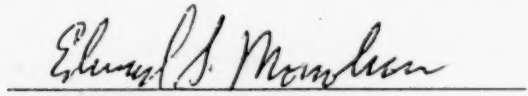
From all of the issues discussed above, only one conclusion can emerge. That conclusion is, because retroactive application of Patterson is not proper where Respondent's liability had already been firmly established; because this Court to date, has not seen it appropriate to include "discharge" cases

under the pall of Patterson, and because of the dissimilarity of "discharge" cases themselves, this action should be remanded to its original position before the District Court and a new date should be set for the trial on the issue of damages.

Should this court agree with the Sixth Circuit's opinion as it relates to the retroactive application of Patterson, Petitioner argues that the claims set forth in Petitioner's tendered Second Amended complaint refer to the same conduct or occurrences which formed the basis of Petitioner's original and first amended complaints; and that all of the facts supporting Petitioner's current amendments were well known by Respondent .and thus are unlikely to "unduly" or "substantially" prejudice Respondent. Therefore, this

case should be remanded to the District Court with an order granting Petitioner's Motion to Amend and the amendments contained therein should relate back to the filing date of Petitioner's original complaint.

Petitioner respectfully prays that a Writ of Certiorari be granted.



EDWARD S. MONOHAN
(Counsel of Record)
KENNETH W. SCOTT
7711 Tanners Lane
P.O. Box 157
Florence, KY 41022-0157
(606) 283-1140
Attorneys for Petitioner,
Samuel I. Prather

CERTIFICATE OF SERVICE

I, Edward S. Monohan, a member of the Bar of the Supreme Court of the United States and Counsel of Record for Petitioner, Samuel I. Prather, hereby certify that three copies of the foregoing Petition were mailed, by United States 1st class mail, postage prepaid, on this 26th day of March, 1991, to Neil F. Freund, 1800 Arcade Center, 1 S. Main Street, Dayton, OH 45402-2017, Attorney for Respondent, Dayton Power & Light Company.

Edward S. Monohan

EDWARD S. MONOHAN
Counsel of Record

APPENDICES

RECOMMENDED FOR FULL TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

No. 89-3999

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

SAMUEL I. PRATHER,
Plaintiff-Appellant,

v.

DAYTON POWER & LIGHT COMPANY,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Southern District of Ohio

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Decided and Filed November 14, 1990

Before: KENNEDY, BOGGS, and TIMBERS*, Circuit Judges.

KENNEDY, Circuit Judge, delivered the opinion of the Court, in which TIMBERS, Circuit Judge, joined. BOGGS, Circuit Judge (pp. 9-16), delivered a separate dissenting opinion.

KENNEDY, Circuit Judge. Appellant Samuel I. Prather appeals the grant of summary judgment to his employer, Dayton Power & Light Company, in this 42

*The Honorable William H. Timbers, United States Court of Appeals for the Second Circuit, sitting by designation.

U.S.C. § 1981 action in which he claims he was discharged on account of his race. Relying on *Patterson v. McLean Credit Union*, 491 U.S. ___, 109 S. Ct. 2363 (1989), the magistrate held that section 1981 provided no remedy for racially motivated discharges. Prather also appeals the denial of his motion to amend his complaint. For the reasons stated hereafter we affirm.

In September 1982, appellant was terminated by Dayton. He pursued a grievance process through collective bargaining arbitration, alleging that he was discharged because of his race, and filed a complaint with the Ohio Civil Rights Commission. The arbitration panel denied his grievance but he eventually received back pay and reinstatement through the Ohio Civil Rights Commission proceedings.

In March 1985, appellant filed this action under 42 U.S.C. § 1981, seeking additional damages for his discriminatory discharge. Following an appeal to this Court, which held that the statute of limitations did not bar appellant's claim, appellant's motion for summary judgment on liability was granted, based on the *res judicata* effect of the state court decision. Before the trial on damages began, the Supreme Court decided *Patterson*. In light of *Patterson*, appellee moved for summary judgment, which the magistrate granted.[1] Appellant then moved to amend his complaint in an attempt to allege facts that would maintain a 1981 action after *Patterson*. Appellant's motion was denied.

I. Application of *Patterson*

The Supreme Court held in *Patterson* that an employee's claims of racial harassment by the employer were not actionable under 42 U.S.C. § 1981 "because that provision does not apply to conduct which occurs after the formation of a contract and which does not interfere with

[1]The parties had consented to magistrate trial jurisdiction under 28 U.S.C. § 636(c).

the right to enforce established contract obligations." 109 S. Ct. at 2369. Section 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other

The *Patterson* Court held that section 1981 does not cover conditions of employment, but only discrimination in the formation of the employment contract or the right to enforce that contract.

> The most obvious feature of the provision is the restriction of its scope to forbidding discrimination in the "mak[ing] and enforce[ment]" of contracts alone. Where an alleged act of discrimination does not involve the impairment of one of these specific rights, § 1981 provides no relief.

Patterson, 109 S. Ct. at 2372 (quoting section 1981).

The Court held that unless the alleged discrimination affected the plaintiff's right to enter into a contract or her right to enforce a contract through judicial or nonjudicial means, then it, "reprehensible though it be if true, is not actionable under § 1981, which covers only conduct at the initial formation of the contract and conduct which impairs the right to enforce contract obligations through legal process." *Id.* at 2374. *Patterson* did not address the issue of discharge directly, but it did explicitly limit the application of section 1981 to discrimination in the formation or enforcement of contracts. Discharge from employment involves neither of these elements.

This Circuit has applied *Patterson* to discharge cases in earlier unpublished opinions.[2] This appears to be the first case, however, in which the application of *Patterson* to discharge cases is addressed directly in a decision for publication. To limit *Patterson* to cases involving discrimination in ongoing employment is to ignore the language and reasoning of the Supreme Court. *Patterson* explicitly stated that section 1981 "does not apply to conduct which occurs after the formation of a contract and which does not interfere with the right to enforce established contract obligations." *Id.* at 2369. In refusing to extend section 1981 to harassment cases, the Court reasoned that Title VII's procedures would be of little effect if they could be circumvented by suits under section 1981. Title VII is clearly concerned with discharge cases and provides for back pay and reinstatement.[3] Reinstatement is not available under section 1981 and is much more likely to come about in the conciliation procedures of Title VII. The Court noted:

> Unnecessary overlap between Title VII and § 1981 would also serve to upset the delicate balance between employee and employer rights struck by Title VII in other respects. For instance, a plaintiff in a Title VII action is limited to a recovery of backpay, whereas under § 1981 a plaintiff may be entitled to plenary compensatory damages, as well as punitive damages in an appropriate case. Both the employee and employer will be unlikely to agree to a conciliatory resolution of the dispute under Title VII if the employer can be found liable for much greater amounts under § 1981.

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[2] *See Jones v. City of Cleveland*, No. 89-3444 (6th Cir. Mar. 15, 1990) (unpublished per curiam); *Singleton v. Kellogg Co.*, No. 89-1073 (6th Cir. Nov. 29, 1989) (unpublished per curiam) ("In light of *Patterson*, plaintiff's claim of racially discriminatory discharge is no longer cognizable under section 1981").

[3] Over 43% of all Title VII cases involve discharge, a far greater percentage than that attributed to any other issue. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, CENTRAL DATABASE STATISTICS (1989) (available upon request from EEOC).

Patterson, 109 S. Ct. at 2375 n.4.

Other circuits which have decided this issue have not agreed on whether *Patterson* excludes discharge cases from causes of action created by section 1981. Several circuits have held that *Patterson* does apply to discharge cases. *See McKnight v. General Motors Corp.*, 908 F.2d 104 (7th Cir. 1990); *Courtney v. Canyon Television & Appliance Rental, Inc.*, 899 F.2d 845 (9th Cir. 1990); *Lavender v. V & B Transmissions & Auto Repair*, 897 F.2d 805 (5th Cir. 1990). *Contra Hicks v. Brown Group, Inc.*, 902 F.2d 630 (8th Cir. 1990) (*Patterson* does not apply to discharge cases).

Appellant argues that *Patterson* does not apply to discriminatory discharge because if discrimination is allowed in the termination of a contract, the purpose of forbidding discrimination in the formation of that contract is defeated. The Eighth Circuit, in its decision in *Hicks*, was concerned with the situation in which section 1981 would prevent discrimination in hiring an applicant one day but would not prevent the employer from discharging that same applicant the next. Section 1981, however, cannot be read as an isolated piece of legislation. Although section 1981 does not create a cause of action for discriminatory discharge, it does not forbid such suits. A plaintiff who has no recourse under section 1981 may still pursue a course of litigation under Title VII, as well as under many state civil rights statutes. Excluding discharge cases from section 1981 actions does not leave plaintiffs without recourse. Appellant's case serves as an example, showing that the different remedies fit together. He has already sued and recovered back pay and reinstatement in a prior state action. It is not necessary to apply section 1981 to discharge cases, and "the Court in *Patterson* counseled against stretching the meaning of section 1981 to protect conduct already covered by Title VII." *Overby v. Chevron USA, Inc.*, 884 F.2d 470, 473 (9th Cir. 1989).

The dissent fails to recognize that Title VII procedures are designed, in discharge cases, to reinstate the employee and resurrect the ongoing relationship. It was Ohio's substitute for Title VII that reinstated Prather. The ongoing relationship with which the *Patterson* Court is concerned, therefore, does exist where the discharged plaintiff prevails, either through EEOC conciliation (or its state substitute) or a Title VII action, and that relationship is likely to be harmed by the award of section 1981 damages.

Further, the case before us does not involve a situation where an employer hired an applicant to conform with section 1981, but never intended to actually make a contract on the terms offered to others. Appellant had been employed for several years before his discharge. The discriminatory conduct he experienced took place well after his contract of employment was in place.

We turn next to the issue of retroactivity. The general rule that judicial decisions be given retroactive effect applies here. *See Robinson v. Neil*, 409 U.S. 505 (1973). In *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), the Supreme Court established three factors that call for the application of the non-retroactivity exception. The situation in this case does not satisfy those factors. Although *Patterson* may have established new law, applying it retroactively will not "'retard its operation,'" nor will it produce "'substantial inequitable results'" that might otherwise be avoided. *Id.* at 106-07 (citations omitted). Although retroactive application of *Patterson* will prevent appellant from obtaining damages under section 1981, appellant has already received reinstatement and back pay through use of state proceedings. Appellant will not, therefore, be unduly prejudiced.[4]

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[4]This Court has already applied *Patterson* retroactively in several unpublished decisions. *See* cases cited *supra* note 2; *Bell v. Kroger, Inc.*, No. 89-3206 (6th Cir. Mar. 6, 1990) (unpublished per curiam) (transfer claim); *Becton v. Burlington Northern R.R. Co.*, No. 86-

II. Appellant's Motion to Amend his Complaint

Appellant moves to amend his complaint in an attempt to continue his section 1981 action. Appellant wishes to incorporate claims that in 1983 appellee interfered with the arbitration proceedings on this matter. Appellant claims that appellee threatened and intimidated witnesses to prevent them from testifying at the arbitration proceedings. Appellant now claims that those actions constituted a violation of his right to enforce his contract. Appellant's amended complaint would claim that appellee violated section 1981 with its "efforts to impede access to the courts or obstruct nonjudicial methods of adjudicating disputes about the force of binding obligations . . . ." *Patterson*, 109 S. Ct. at 2373.

The magistrate denied appellant's motion to amend his complaint because the amendment at this late date, eight years after he was discharged and seven years after the alleged intimidation, would be highly prejudicial to the appellee. Appellant's original and amended complaint included only allegations of discriminatory discharge. Appellant offers no reason for the omission of these claims from his earlier complaint. The amendment relates to entirely different conduct than that involved in the original complaint, since the arbitration process was never before at issue. To force appellee to begin to formulate a defense to these allegations at this late date would be highly prejudicial. *See Foman v. Davis*, 371 U.S. 178 (1962). The magistrate did not abuse his discretion in denying appellant's motion to amend the complaint.

The grant of appellee's motion for summary judgment and denial of appellant's motion to amend are AFFIRMED.

6136 (6th Cir. July 10, 1989) (unpublished per curiam) (claims of harassment and demotion).

BOGGS, Circuit Judge, dissenting. Because I believe that a logical and faithful reading of the Supreme Court case law compels the conclusion that discriminatory discharges are actionable under 42 U.S.C. §1981, I respectfully dissent.

I believe that the statutory language, "right . . . to make . . . contracts," is properly interpreted to include the right to continue to work under an employment contract in the face of a discriminatory discharge. This interpretation has been confirmed by the Supreme Court on numerous occasions. *See, e.g., Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987); *Saint Francis College v. Al-Khazraji*, 481 U.S. 604 (1987); *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976). It has never been explicitly rejected.

A commonsense understanding of §1981 is that the right to be free from discrimination in the making of a contract includes the right to be free from discrimination in the unilateral termination of that contract. Discharge is fundamentally different from harassment and other types of "conduct by the employer after the contract relation has been established." *Patterson*, 109 S. Ct. at 2373. By subsuming discriminatory discharge under the category of "conduct which occurs after the formation of a contract," *id.* at 2369, the court today dismisses what seems to me to be a basic distinction: by no other postformation action is the employee deprived of the fundamental benefit of the employment contract -- a job. A discriminatory discharge destroys the very existence of the contract and deprives the employee of the essence of the right to make an employment contract.

It seems to me rather irrelevant that, as the court notes, Prather was not terminated the very day or week after he entered his employment contract. That "[t]he discriminatory conduct that he experienced took place well after his contract of employment was in place" (opinion at 6) does not diminish the harshness of the court's general holding. By relieving an employer of

liability under §1981 for firing an employee after hiring, the court permits an employer to accomplish through the back door what §1981 will not permit that employer to do directly. I find it thoroughly inconsistent to require an employer to be nondiscriminatory in hiring but to allow that employer to fire with impunity under the statute.

The Supreme Court decisions interpreting 42 U.S.C. §1981 and its reach are not a model of clarity. In the landmark case of *Runyon v. McCrary*, 427 U.S. 160 (1976), the Supreme Court pushed the meaning of §1981 beyond its obvious language. The statute states only that "all persons . . . shall have the same *right* . . . to make and enforce contracts as is enjoyed by white citizens." (Emphasis added). However, the Supreme Court held that in cases involving discrimination, persons should have a right not otherwise accorded to white citizens, the right to make a contract with an unwilling opposing party. This decision added a panoply of new remedies, including jury trial and damages, as well as a new range of targets, such as private schools, to the nation's basic anti-discrimination laws.

The law at this point was relatively clear. In *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989), however, the Supreme Court, while retaining the basic interpretation of "right" as meaning "privilege," revisited the term "make contracts" and restricted the meaning of that term. *Patterson*, 109 S. Ct. at 2373-75.

Having previously determined that a proper interpretation of §1981 permits a suit for a discriminatory discharge, I find, as others have, that "the difficult question is whether that interpretation can and does survive *Patterson*." *McKnight v. General Motors Corporation*, 908 F.2d 104, 117 (7th Cir. 1990) (Fairchild, J., concurring in part). The language of *Patterson*, to the extent it can be read as pertaining to discharges, is equivocal at best. For example, the Court states that the right to make a contract "extends only to the formation of a contract, but not to problems that arise

later *from the conditions of continuing employment.*" 109 S. Ct. at 2372 (emphasis added). This language seems to imply that if a discharge is not a "problem" arising from a "condition of continuing employment," then it is actionable under §1981. Elsewhere, however, the Court states with apparently greater definitiveness that "§1981 . . . does not apply to conduct which *occurs after the formation of a contract* . . . ." *Id.* at 2369 (emphasis added). But still later, the Court states that "*postformation conduct* does not involve the right to make a contract, but rather implicates the performance of established contract obligations and the *conditions of continuing employment* . . . ." *Id.* at 2373 (emphasis added). This statement suggests that, to the extent that a discharge does more than "implicate[] . . . the conditions of continuing employment," a discharge is not the sort of postformation conduct that the Court found not to "involve the right to make a contract."

Our problem is created by the fact that these two principles point to directly opposite conclusions in the case of firings motivated by allegedly racial discrimination. A literal application of the language on "post-formation conduct" means §1981 does not cover firings. Firings, by definition must follow hirings. However, the Court has indicated that at least one type of conduct that appears to be post-formation, promotion, shall be deemed to relate to the making of a new contract, and thus falls outside this language. *Id.* at 2377.

On the other hand, a literal application of the second stricture would allow suits concerning firing. Mr. Prather does not complain of his conditions of employment. He complains that he has no employment, having been wrongly fired. The majority concedes that a hiring, followed closely by a firing, could be considered the functional equivalent of no hiring at all, thus triggering §1981 coverage. Opinion at 5. It seems to me that a firing at any date raises the same concerns as a failure to hire:

(1) The party has no contract; it was made in the past, but it has now been completely unmade.

(2) There is no relationship to salvage. It has been terminated by the employer.

(3) Title VII may not provide complete relief.

As none of this language seems to remove discharge claims from the protective scope of §1981, the dissent in *Patterson* assumed, without objection by the majority, the statute's continuing application:

> The very same legislative history that supports our interpretation of §1981 in *Runyon* [v. *McCrary*, 427 U.S. 160 (1976)] also demonstrates that the 39th Congress intended, in the employment context, to go beyond protecting the freedmen from refusals to contract for their labor *and from discriminatory decisions to discharge them.*

109 S. Ct. at 2388 (emphasis added).

I find illuminating the Court's consideration of Patterson's claim for failure to promote. The Court held that a racially discriminatory denial of a promotion, in contrast to the harassment of an employee, is actionable under §1981 "where the promotion rises to the level of an opportunity for a new and distinct relation between the employee and the employer." *Id.* at 2377. This holding indicates that the Court believed that *some* post-contract formation activity -- that which strikes at the essence of the contract or affects its very existence -- is actionable under §1981.

I would hold that the entire reason for protecting "the right to make contracts" is because of the benefits of the status of having a contract or job. If §1981 can cover the failure to achieve a "new and distinct relation" within an existing job, it would seem to me to be most illogical to deny that §1981 covers a persons being cast into a "new

and distinct relation" -- that of unemployment -- from an existing job. Certainly that severance is far more drastic in practical terms than the failure to achieve a promotion. It is also more destructive of the existing relationship, the very relationship that is a reason given for not allowing actions based on conditions of employment. *See Patterson*, 109 S. Ct. at 2374-75.

The court today emphasizes that Prather's claim is more properly cognizable under Title VII, and that the *Patterson* Court sought to avoid "[u]nnecessary overlap between Title VII and §1981." *Id.* at 2375 n.4. *Patterson* recognized, however, that "some overlap will remain between the two statutes: specifically, a refusal to enter into an employment contract on the basis of race." *Id.* at 2375. Because I believe that a discriminatory discharge constitutes a constructive refusal to enter into a nondiscriminatory employment contract, I find this to be a case in which overlap between the two remedial statutes is appropriate under *Runyon*.

In explaining why it took the action that it did in *Patterson*, the court emphasized the following factors distinguishing the areas remaining under the "privilege" doctrine of §1981:

(1) they involve the essence of an employment relationship, *Id.* at 2377;

(2) the overlap with Title VII and other remedies is more understandable, *Id.* at 2375; and,

(3) the more meliorative remedies of Title VII would be preferable only where a relationship existed. *Ibid.*

The facts here offer a particularly compelling case for a resort to §1981. Prather filed an EEOC charge, and the Ohio Civil Rights Commission ordered an award of back pay. Prather now seeks a remedy unavailable under Title VII -- the recovery of damages sufficient to compensate him completely for the discrimination he suffered. I

cannot agree with the court that Prather's §1981 claim would allow him to "circumvent" Title VII's procedures, since Title VII does not offer the relief sought.[1]

A very recent Third Circuit case shows the extremely strained construction that can arise from an absolutely fixed gaze on the moment of contract formation. In

Perry v. Command Performance, 913 F.2d 99 (3d. Cir. 1990), a black customer called a hairdressing parlor and made an appointment for service. When she appeared, the available hairdresser made the claim (perhaps novel in American jurisprudence) "I'm from New Hampshire and I don't deal with blacks!" *Id.* at 100. The district court granted summary judgment for the defendants on the ground that this act was clearly "post formation." The Third Circuit reversed and remanded, directing the district court to determine whether the contract was made at the time of the phone call or was only made if service was offered when the customer appeared. *Id.* at 102. The circuit court apparently agreed with the majority in our case that any type of conduct, no matter how discriminatory, is not encompassed by §1981 if it literally occurs after formation.

In my view, this simply emphasizes that the focus should be on whether the contract is actually in existence and being carried out to some degree, in which case quarrels over conditions of employment or conditions of service are not actionable. To say that there is no action for making a contract on the phone and breaking it when the person appears is to undermine completely the court's holding in *Runyon* and its reaffirmation in *Patterson*.

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[1] Although the court cites the statistic that 43% of all Title VII cases involve discharge claims (opinion at 4, n.4) in support of its argument that a claim such as Prather's can be adequately addressed by Title VII, I note that studies have indicated that discriminatory discharge actions have traditionally been one of the most common uses of §1981. See Hicks v. Brown Group, Inc., 902 F.2d 630, 638 (8th Cir. 1990)(citing Eisenberg and Schwab, The Importance of Section 1981, 73 Cornell L. Rev. 596, 599-601 (1988)).

There is further evidence that the Court in *Patterson* did not intend to withdraw discharge suits from §1981's protection. The Court has several times in subsequent cases indicated that it has not decided this question. In *Jett v. Dallas Independent School District*, 109 S. Ct. 2702, 2709 (1989), decided one week after *Patterson*, the Supreme Court assumed *arguendo* that the scope of the "right . . . to make . . . contracts" under §1981 reaches racially motivated discharges. In *Jett*, the employer school district did not contest that the football coach who was relieved of his duties was protected by §1981. The Court therefore "assume[d] . . . , without deciding, that petitioner's rights under §1981 have been violated by his removal and reassignment." *Id.* at 2710. It appears that the Court had a clear opportunity in *Jett* to apply *Patterson* to discharge cases but declined to do so.

Then in *Lytle v. Household Manufacturing, Inc.*, 110 S. Ct. 1331 (1990), the Court reaffirmed that it had not decided the question whether a retaliatory discharge is actionable under §1981. Because the district court had not addressed the question, the Court refused to decide the matter without the benefit of a complete record. Justice O'Connor in concurrence noted that:

> [o]n remand, therefore, the parties will have ample opportunity to present arguments, and the lower courts will have the first opportunity to consider whether either of petitioner's charges relates to the formation or enforcement of a contract, the two types of claims actionable under §1981, *Patterson*, . . . 109 S. Ct., at 2374, or relates only to "postformation conduct unrelated to an employee's right to enforce [his] contract." *Id.*, at . . . 2367.

Id. at 1339.

I do not believe that the Court would have failed to discuss in *Patterson* the implication of that opinion for the substantial body of Supreme Court case law permitting discharge suits under §1981 if *Patterson* was intended to

have any such implication. I also find it significant that neither *Jett* nor *Lytle* makes the same assumptions about *Patterson*'s effect on discharge claims that the court's opinion does today.

In our situation, the Supreme Court apparently having been deliberately ambiguous, it seems to me that we should interpret *its* ambiguities in a fashion that makes the law a more coherent scheme. Having been precluded from a rigorous interpretation of the language of the statute by the decisions in *Runyon* and *Patterson*, we should give those decisions an interpretation that will provide sensible coverage of "an evil aimed at" rather than a strained construction, not compelled by the statutory language. Our decision today will, in the words of Shakespeare's *Macbeth*, "keep the word of promise to our ear, and break it to our hope."[2]

If Mr. Prather has a right to "make" a contract with an unwilling adversary, that right is substantially vitiated if the adversary can "unmake" the contract without legal liability or opportunity for redress.

As *Patterson* leaves open the question whether a discriminatory discharge violates §1981, I would respect the principle of *stare decisis* and continue to permit, under §1981, suits alleging discriminatory discharges. I therefore would agree with the decision of the Eighth Circuit in *Hicks v. Brown Group, Inc.*, 902 F.2d 630 (8th Cir. 1990) and would reverse and remand for a new trial.

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[2]Macbeth, Act V, Scene vii, lines 50-51.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

SAMUEL I. PRATHER,

Plaintiff Civil Action No.C-3-85-491

-vs- Magistrate Merz

DAYTON POWER & LIGHT CO.

Defendant

DECISION AND ENTRY GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

This action for compensatory and punitive damages are related injunctive relief under 42 U.S.C.§1981 is before the Court on Motion of Defendant, The Dayton Power & Light Company, for Summary Judgment (Dcc. #59). Because Plaintiff's Amended Complaint, construed in light of Patterson v. McLean Credit Union, 491 U.S. ____, 105 L. Ed. 2d 132, 109 S. Ct. ____ (1989) fails to state a claim for relief which can be granted under §1981, Defendant's Motion is GRANTED.

Procedural History

Plaintiff filed his Complaint herein on March 18, 1985, under 42 U.S.C. §1981 seeking injunctive relief (reinstatement to his job with Defendant) and compensatory and exemplary damages (Doc. #I). Thereafter on February 27, 1986, Judge Richard Dodge of the Montgomery County Common Please Court affirmed the decision of the Ohio Civil Rights Commission finding that DP&L had discharged Mr. Prather in violation of his civil rights. Based on this Common Pleas judgment, Plaintiff moved for summary judgment in this Court as to liability under §1981 (Doc. #II, 3/7/86).

DP&L cross-moved for summary judgment on the basis of the statute of limitations (Doc. #19). Mr. Prather had been discharged on September 13, 1982, and DP&L argued this meant his §1981 claim was barred under Mulligan v. Hazzard, 777F. 2d 340 (6th Cir. 1985), The Magistrate and District Judge Weber agreed (Doc. ##20, 26, 27), but the Sixth

Circuit reversed on the basis of Demery v. Youngstown, 818 F. 2d 1257 (6th Cir. 1987) (Doc. #32).

Upon remand, the Magistrate recommended that Mr. Prather's summary judgment motion on liability be granted, based on the doctrine of res judicata (Doc. #33). Thereafter the parties unanimously consented to magistrate trial jurisdiction under 28 U.S.C. §636(c) and on March 17, 1989, the Magistrate adopted his prior Report and Recommendations as a decision, with certain modifications (Doc. #52). Immediately prior to that decision, the Magistrate had entered a Scheduling Order for completion of discovery by June 1, 1989, and jury trial on August 14, 1989 (Doc. #51). Pursuant to that Order, Mr. Prather filed an Amended Complaint specifying his damages claims and the parties prepared a proposed joint final pretrial order which was journalized with slight modifications after final pretrial conference on August 4, 1989 (Doc. #56). At the final pretrial conference, DP&L sought

leave to file a motion for summary judgment, a motion Mr. Prather's counsel did not oppose, and DP&L filed the motion sub judice on August 9th, Mr. Prather replying on August 10th.

Findings of Fact

The relevant facts are set forth in the Findings of Fact, Conclusions of Law and Order of the Ohio Civil Rights Commission ("OCRC") filed March 12, 1985 (Attached to Doc. #11). These findings have been affirmed on appeal by the Montgomery County Common Pleas Court and the Ohio Supreme Court, Dayton Power & Light Company vs. Ohio Civil Rights Commission, 33 Ohio St. 3d 73, 514 N.E. 2d 1132 (1987). They are entitled to preclusive effect in this Court. 28 U.S.C. §1783; Kremer vs. Chemical Construction Corp., 456 U.S. 461 (1982); Allen v. McCurry, 449 U.S. 90 (1980); Migra vs. Warren City School District Bd. of Educ. 465 U.S. 75 (1984).

Mr. Prather's original Charge Affidavit, filed February 28, 1983, alleged that DP&L terminated him because he is black. The OCRC found that Mr.

Prather was employed by DP&L at its Stuart Generating Station from March 19, 1970, until September 13, 1982. On that date he was discharged for cutting a water hose, discipline which the OCRC found to have been caused by Mr. Prather's race and to be harsher than that imposed on white employees for similar conduct. The OCRC ordered Mr. Prather reinstated with back pay. After remand by the Ohio Supreme Court, Mr. Prather was reinstated and paid $235,667.27 in back pay and benefits (Exhibits A,B, C, and D to Doc. #59). It is conclusively established that Mr. Prather was discharged by DP&L because of his race.

Opinion

This Court had previously held (Doc. #33, p.2) that the elements of a claim for relief under 42 U.S.C. §1981 were identical to those under Title VII, 42 U.S.C. §2000e et seq., based on Eleventh Circuit law, Stallworth v. Shuler, 777 F.2d 1431 (1985); and Lincoln v. Board of Regents, 697 F.2d 928 (1983). At the time Mr. Prather moved for summary judgment,

DP&L did not contest this proposition (Doc. #33, p. 2), but it now relies on the Supreme Court opinion in Patterson v. McLean Credit Union, supra, as a bar to §1981 liability here.

Ms. Patterson charged McLean Credit Union with racial discrimination under §1981 for racial harassment, failure to promote, and discharge. The District Court held racial harassment was not actionable under §1981, but submitted the discharge and failure to promote issues to the jury, which found for McLean. 105 L. Ed. 2d at 146. No issues relating to the discharge claim was appealed, but the case reached the Supreme Court on certiorari on the harassment and failure to promote questions. On its own motion, the Supreme Court had the case reargued on the continued soundness of Runyon v. McCrary, 427 U.S. 160 (1976), the decision which had firmly established the liability of private parties to actions under §1981.

In an opinion by Justice Kennedy, the Supreme Court reaffirmed Runyon on stare decisis

grounds, but implicitly rejected decisions such as Stallworth, supra, which made §1981 liability coterminous with Title VII liability. Instead, the majority interpreted §1981 as limited to forbidding discrimination in the making and enforcement of contracts.

> The first of these protections extends only to the formation of a contract, but not to problems that may arise later from the conditions of continued employment. ... the right to make contracts does not extend, as a matter of either logic or semantivs, to conduct by the employer after the contract relation has been established, including breach of the terms of the contract or imposition of discriminatory working conditions. Such post-formation conduct does not involve the right to make a contract, but rather implicates the performance of established contracts obligations and the conditions of continuing employment, matters more naturally governed by state contract law and Title VII.

105, L. Ed. 2d at 150-51. Regarding Ms. Patterson's claim of racial harassment, the Supreme Court explicitly held:

> ...racial harassment relating to the conditions of employment is not actionable under §1981 because that provision does not apply to conduct

> which occurs after the formation of a contract and which does not interfere with the right to enforce established contract obligations.

105 L. Ed. 2d at 147.

Mr. Prather attempts to distinguish Patterson on the grounds it was a racial harassment case and he complains of a racially motivated discharge (Memorandum in Opposition to Motion for Summary Judgment, Doc. #61, at pp. 1-2).

Whether Ms. Patterson's §1981 discharge claim should have gone to the jury was not before the Supreme Court; the jury found against her and thus there was no real vehicle to appeal that issue. But to reach its holding, the Supreme Court had to apply the major premise that §1981 does not reach post-formation conduct except conduct which interferes with the right to enforce contracts. That major premise logically extends to racially motivated discharges. Hence this Court holds that DP&L's racially motivated discharge of Mr. Prather is not actionable under §1981.

Plaintiff's counsel present only only one paragraph of argument on whether racially motivated discharges come within Patterson (Doc. #61, pp. 1-2). The bulk of their argument is directed to claiming that Mr. Prather comes within the enumerated rights in §1981 because DP&L interfered with Mr. Prather's right to enforce his contract of employment. They assert:

> At the time of DP&L's racially motivated termination of plaintiff, plaintiff was a member of the recognized labor bargaining unit know as, "Local 175, Utility Workers, AFL-CIO." It is plaintiff's position herein, and the evidence at trial will show, that defendant's conduct during the course of the labor contract arbitration procedure, consisted of offering into evidence, a fiction, or as the state court action determined, a pretext, to mask the improper racial motives behind their acts. This "corruption" on the part of the defendant during the course of the arbitration proceeding amounted to nothing less than an impairment or outright obstruction of plaintiff's right to enforce contractual obligations by nonjudicial methods. The aforesaid action taken by defendant is clearly within the prohibitions enumerated in section 1981.

(Doc. #61, pp. 2-3).

In Patterson the Supreme Court held that the right to enforce contracts free of racial discrimination was one of the rights enumerated in §1981:

> The second of these guarantees, "the same right ... to ... enforce contracts ... as is enjoyed by white citizens," embraces protection of a legal process, that will address and resolve contract-law claims without regard to race. In this respect, it prohibits discrimination that infects the legal process in ways that prevent one from enforcing contract rights, by reason of his or her race, and this is so whether this discrimination is attributed to a statute or simply to existing practices. It also covers wholly private efforts to impede access to the courts or obstruct nonjudicial methods of adjudicating disputes about the force of binding obligations...

105 L. Ed. 2d at 151.

As the Court understands Mr. Prather's claim, he now assets that DP&L violated his §1981 right to enforce his contract of employment by introducing false evidence at the arbitration hearing. The Court assumes that the false evidence adverted to is the evidence that Mr. Prather was discharged for destroying company property. We know this evidence to be "false" because the OCRC

determined it to be pretextual.

What the OCRC actually did was to infer, from all the evidence, that the discharging officials were racially motivated. This inference is "true" and the competing inference (that the discharge was solely the result of discipline applied without regard to race) is "false" because the OCRC is empowered by law to make findings of fact. It is an inference about intent of the DP&L decisionmakers. It is only an inference, albeit a legally conclusive one. There is no evidence nor did the ORCE itself or its hearing examiner suggest that DP&L presented deliberately perjured testimony on the historical facts: Mr. Prather admitted that he had cut the hose and no DP&L employee has admitted that he recommended the discharge because of racial motivation. (There is, however, ample evidence of racially hostile attitudes on the part of some of Mr. Prather's co-workers.)

Plaintiff does not allege that DP&L presented deliberately perjured testimony or that its lawyers or the company officials authorizing them to present this

case in arbitration knew that any of the company's witnesses was lying either about historical facts or his motivation. Allegations of deliberate presentation of perjured testimony in an arbitration proceeding would probably state a claim for relief under §1981, but no such allegations are made here.

This Court holds that the allegations Mr. Prather does make -- that DP&L presented "false" testimony in that it was not believed by the finder of fact -- does not state a claim for relief under §1981. To permit such a claim would be to hold an employer liable under §1981 every time it contested in good faith and lost a breach of contract claim, either in arbitration or in court. Surely an employer does not interfere with an employee's right to enforce contracts free of racial discrimination when it presents a defense in good faith to a breach of contract claim in court or arbitration. The Supreme Court's explication in Patterson of the second right guaranteed by §1981 does not imply that an employer defends a racial breach of contract case at

its peril. While a good faith defense in such a case does "impede" the employee's enforcement of his or her contract rights, it is an impeding contemplated by our adversary system. The Congress which enacted §1981 surely did not intend to preclude good faith defenses to contract actions brought by black people.

Alternatively, this Court holds that Mr. Prather is procedurally barred from presenting in this action at this time his claim of interference with enforcement of contract rights under §1981.[1]

This case has been litigated for over six years, administratively and in the Ohio and federal courts, as a claim for racially motivated discharge. From the filing of the Charge Affidavit with the OCRC in February, 1983, through filing the Final Pretrial Order

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[1] The Court assumes that Mr. Prather will appeal this Court's ruling that a racially motivated discharge is not actionable under §1981. The alternative procedure ruling commenced in this paragraph on the enforcement of contract issue is included in the event the Court of Appeals disagrees with this Court's substantive ruling on the second issue.

here on August 8, 1989, that has been Plaintiff's sole claim. Putting aside the issue whether he must first present it administratively to the OCRC and EEOC, he has never argued it in this Court until his Memorandum in Opposition to DP&L's motion for summary judgment. Both the Complaint and the Amended Complaint speak only of the discharge issue. That was the sole claim on which the Court rendered partial summary judgment as to liability and as late as the Final Pretrial Order Plaintiff contended all the liability issues has been decided. Plaintiff contends he can prove the new claim at trial (Doc. #61), but the Final Pretrial Order contains no such claim and it "controls the subsequent course of the action." McDowall v. Orr Felt & Blanket Co., 146 F. 2d 136 (6th Clr. 1944). Even if the Court were to permit an amendment of the pleadings to assert this claim, it would be fundamentally unfair to require Defendant to litigate the claim with no more notice that it has had.

The Court is not prepared to conclude that

Plaintiff can never plead and prove a set of facts which would entitle him to relief on his claim of interference with his §1981 right to enforce contracts free of racial discrimination. See Conley v. Gibson, 355 U.S. 41 (1957). As to any such claim, the Amended Complaint will be dismissed without prejudice for failure to state a claim upon which relief can be granted. Since this Court interprets Patterson v. McLean Credit Union as permanently barring any claim for the racially motivated discharge, that claim will be dismissed with prejudice.

Defendant filed its motion for summary judgment herein four days before trial, at a time when the Court could not call of the jury panel without continuing the trial in the event the motion was not granted. Accordingly, the Clerk shall assess against Defendant the costs of summoning the jury panel for the trial of this case.

August 14, 1989.

MICHAEL R. MERZ
U. S. MAGISTRATE

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

SAMUEL I. PRATHER,

Plaintiff Civil Action No.C-3-85-491

-vs- Magistrate Merz

DAYTON POWER & LIGHT CO.

Defendant

DECISION AND ORDER DENYING
MOTION TO AMEND

This case is before the Court upon Plaintiff's Motion for Leave to File an Amended Complaint (second branch of Doc. #72).

Plaintiff Samuel Prather was terminated by Defendant Dayton Power & Light Co. ("DP&L") on September 13, 1982, for intentionally cutting a hose at work. Alleging the termination was racially motivated, he pursued a grievance under the collection bargaining agreement which reached the arbitration hearing stage on June 7, 1983 (See

Transcript of Arbitration Hearing, Doc. #76); a unanimous unfavorable decision was rendered by the arbitration panel on August 18, 1983 (Exhibit C to Doc. #75).

Mr. Prather also filed a complaint of racial discrimination in the discharge with the Ohio Civil Rights Commission which resulted in a favorable finding ultimately affirmed by the Ohio Supreme Court. Dayton Power & Light Co. v. Ohio Civil Rights Commission, 33 Ohio St. 3d 73, 514 N.E. 2d 1132 (1987). Upon remand, Mr. Prather was granted reinstatement and back pay and benefits in the amount of $235,667.27 (Exhibits A-D to Doc. #59).

Giving the Ohio judgment res judicata effect, this Court granted Mr. Prather's motion for summary judgment on liability (Doc. #52, March 17, 1989) and set a damages trial for August 14, 1989. However, just prior to trial, DP&L moved for summary judgment on the basis of the Supreme Court's decision in Patterson v. McLean Credit Union, 491 U.S. ___, 105 L. Ed. 2d 132, 109 S. Ct. 2363 (1989). Reading

Patterson as barring §1981 actions for discharge, the Court granted DP&L's summary judgment motion (Doc. #68) and has denied (Doc. #78) Plaintiff's Motion to Amend Judgment which advanced various arguments why Patterson should not be applied.

In Patterson the Supreme Court read 42 U.S.C. §1981 as limited to forbidding racial discrimination in the making and enforcement of contracts. As to this second right, the Supreme Court found that it reaches "discrimination that infects the legal process in ways that prevent one from enforcing contract rights" and "covers wholly private efforts to impede access to the courts or obstruct nonjudicial methods of adjudicating disputes about the force of binding obligations." 105 L. Ed. 2d at 151.

The Complaint in this case was filed March 18, 1985. From that date until filing the motion to amend, and indeed in the prior grievance and Ohio Civil Rights proceedings, Plaintiff pursued one and only claim for relief; that he had been terminated because

of his race. That claim was cognizable in this Court under 42 U.S.C. §1981 until Patterson, but is no longer viable. Plaintiff now seeks to resurrect his §1981 claim by asserting, for the first time, that DP&L interfered with his right to enforce his collective bargaining agreement by threatening and intimidating potential witnesses in the arbitration process. (See proposed Second Amended Complaint, attached to Doc. #72).

Fed. R. Civ. P. 15(a) requires a party in Plaintiff's position to obtain leave of court to amend and provides "leave shall be freely given when justice so requires." The factors to be considered in determining such a motion was specified by the Supreme Court in Foman v. Davis, 371 U.S. 178, 9 L. Ed. 2d 222, 83 S. Ct. 227 (1962):

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive

> on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. -- the leave sought should, as the rules require, be "freely given."

Id. at 182.

Mr. Prather's new claim appears to state a claim for relief under §1981 as interpreted in Patterson. DP&L has made no objection on this basis, and it appears to the Court that a racially based interference with arbitration proceedings comes within §1981.

However, stating a claim for relief is not adequate under Foman. This Court finds that Mr. Prather has delayed unduly in presenting this new claim and that allowing it at this point would unduly prejudice DP&L and the motion to amend will accordingly be denied.

Mr. Prather's reasons for waiting over four years to asset this claim are completely unexplained. The allegation is that DP&L prevented certain

unnamed potential witnesses from testifying in his favor at the arbitration proceeding by intimidating them. Several such persons have supplied affidavits in support of the motion. As DP&L points out, these are all persons about whom Plaintiff has known for some time: they are co-workers at the Stuart Station who were listed as trial witnesses in this case. There is no indication in any of Plaintiff's motion papers that Plaintiff recently learned of any such threats. Plaintiff's union Steward, James Work, who represented him in the grievance process, does not indicate any witnesses refused to testify for fear of retaliation. Totally absent is any comment by the union attorney, Bruce Pence, who represented Mr. Prather at the arbitration proceeding. While leave to amend to add new claims found in the course of discovery is quite common, there is no indication when Mr. Prather learned of this claim or that he did not know of it well before the original complaint was filed. In the absence of any explanation for the delay, denial of leave to amend is within the Court's

discretion. Freeman v. Continental Gin Co., 381 F. 2d 459 (5th Cir. 1967); Isaac v. Harvard University, 769 F. 2d 817 (1st Cir. 1985).

Of course, a motion to amend is not the place to litigate the merits of the proposed amended complaint. However, when evidence is offered in support of a motion to amend, as Plaintiff has done here, the Court may properly consider the strength of that evidence in determining whether justice requires that the amendment be allowed. In that vein, the Court observes that the tendered affidavits are quite thin. None of the witnesses testifies in the affidavits offered in support of the motion that he was personally threatened by anyone. Danny Doyle says he feared retaliation, but mentions no particular threats at the arbitration stage, although he says he was told that a management person was unhappy with his involvement at the OCRC level (Doyle admitted cutting a hose himself, for which he was also fired.) He also says a number of supervisors (unnamed) indicated to him by their demeanor

(undescribed) and remarks (not quoted) that they didn't want him to help Prather. James Work, Mr. Prather's union steward who represented him in the grievance proceeding, says that Mr. Ralston indicated to him any employee who admitted intentional destruction of company property would be disciplined. Randall Moore says in conclusory fashion that his fellow employees are afraid to testify for fear of retaliation. Danny Dudley also recites no threats, but says supervisory personnel refused to discuss Prather's case with him.

Five of Plaintiff's co-employees did testify at the arbitration proceeding, specifically on the issues of racial attitudes by management personnel. None of Plaintiff's affidavits assert that any retaliation has been taken against any of these employees.

The Court also finds that permitting the amendment would unduly prejudice DP&L. As noted in its motion papers, the Defendant has litigated this case in a number of different fora since 1982. It has deposed the Plaintiff twice without any mention of

any alleged obstruction of the arbitration process. The Court would now be required to reopen discovery; indeed, discovery would essentially have to start over.

Finally, in determining what justice requires in this case, the Court is not unmindful that Plaintiff has already obtained reinstatement to his job and a judgment in excess of a quarter of a million dollars, which has been paid. What Plaintiff now seeks is an opportunity to re-litigate the fairness of a preliminary state of this litigation. Although he had an available remedy to set aside the arbitration award if it was unfairly arrived at, he never pursued that remedy. In effect, the arbitration award has been rendered moot by the OCRC award and its subsequent enforcement by the Ohio courts.

The Motion for Leave to Amend is DENIED.

In the Court's opinion, this case is now final for purposes of appeal.

October 28, 1989.

MICHAEL R. MERZ
U. S. MAGISTRATE

FILED

DEC 28 1990

LEONARD GREEN, C

NO. 89-3999

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SAMUEL I. PRATHER,

Plaintiff-Appellant,

ORDER

v.

DAYTON POWER & LIGHT COMPANY,

Defendant-Appellee

BEFORE: KENNEDY and BOGGS, Circuit Judges; and TIMBERS*, United States Circuit Judge.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

* Hon. William H. Timbers sitting by designation from the United States Court of Appeals for the Second Circuit.

§ 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as it enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.